GUNUNG BAYU SDN. BHD.

v.

SYKT PEMBINAAN PERLIS SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 31-13-87]
7 MARCH 1987

CIVIL PROCEDURE: *Dispute between parties - Proceedings in High Court - Appeal in Supreme Court - Matter later referred to arbitration by consent and pleadings delivered - Originating Summons by plaintiffs seeking, inter alia, declaration that contract governing both parties void for uncertainty - Whether plea bound by estoppel or res judicata.*

The contract between the plaintiffs and the defendants referred, *inter alia,* to any dispute or difference arising between the parties or the architect to be referred to arbitration. Diputes arose between the plaintiffs and the defendants. The defendants gave notice of determination of employment and caused a writ of Summons to be issued in the High Court on 30 October 1984 claiming RM505,700 being amounts due and payable under 5 interim certificates. The plaintiffs entered a conditional appearance. The plaintiffs then filed a stay of proceedings on 18 November 1984 to refer the matter to arbitration which was later dismissed. The defendants obtained summary judgment on 22 January 1985. The plaintiffs lodged an appeal to the Supreme Court on 13 & 22 January 1985 for the dismissal of the stay of proceedings and summary judgment respectively.

On 18 June 1985, by consent of the parties, a Mr. Moffatt was nominated to act as arbitrator of the dispute. On 20 September 1985, the Supreme Court allowed both the plaintiffs' appeals aforesaid and further ordered by consent that the proceedings in the High Court be stayed and the disputes between the parties be referred to arbitration.

The plaintiffs and the defendants then filed their respective pleadings with the arbitrator and a hearing date was fixed. However on 7 March 1986 the arbitrator, Mr. Moffatt, withdrew from the arbitration owing to a hearing problem and the dates of hearing previously fixed were cancelled and new dates had to be fixed. The defendants then took out an originating summons for the appointment of a new arbitrator named Mr. Cheang Kok Cheow to which the plaintiffs consented. The new arbitrator ordered fresh pleadings to be delivered and fixed fresh hearing dates. The defendants filed a fresh statement of claim with the new arbitrator. On 4 October 1986, the plaintifffs for the first time took the point in its points of defence and counterclaim with the new arbitrator that the contract was void for uncertainty. The defendants then filed a fresh reply and defence to the counterclaim. On 7 January 1987, the plaintiffs filed an originating summons seeking, *inter alia,* to declare the contract void for uncertainty.

The dominant question of law which arose was whether having regard to the chronology of various legal proceedings, was it too late for the plaintiffs to take the point by way of the present application that the contrat was void for uncertainty. The plaintiffs' solicitor explained that the point about the contract being bad for uncertainty was not taken at an earlier stage of the proceedings between the parties because of an oversight.

Held:

[1] It was manifestly clear that before the learned Judge in the High Court and before the Supreme Court no issue arose as regards the validity of the contract concerned and when the plaintiffs consented to the order made by the Supreme Court, they had made "an erroneous assumption of a fact", namely that there was a valid and binding contract under which the arbitrator had jurisdiction to act. The plaintiffs could therefore not resile from the position they took in the Supreme Court as the plea of issue estoppel or *res judicata* in its wider sense will apply.

[2] The plaintiffs are also precluded by their own conduct from denying the jurisdiction of the arbitrator as by obtaining a stay of proceedings for the express purpose of having the defendants claim referred to arbitration pursuant to the terms of the contract, the plaintiffs had taken the first step in setting in motion the arbitration proceedings. They are accordingly estopped from putting forward the contention that the contract is void for uncertainty for the avoidance of the contract involves the avoidance of the arbitration clause which is part of the contract.

[3] By the plaintiffs' conduct in omitting to take the point both in the High Court and on appeal to the Supreme Court, that the contract was bad for uncertainty and by leaving the issues to be tried as one of fact, the plaintiffs are deemed to have deliberately and finally abandoned such rights as they may originally have had to stand upon their point of law.

[Originating Summons struck out. Costs to follow the event.]

Cases referred to:

A.J. Mills Co. v. J. & G. Brokers Ltd. (SB) [1953] AIR Cal 458
Ram Singh v. Imperial Bank of India [1928] AIR Lah 802
Surajmull Nargoremull v. Triton Insurance [1924] LR 52 126; [1924] 78 Ind Cas 850
A.M. Ayyar v. P.B.L. Mudali [1935] AIR Mad 404
James H. Kennedy v. David Kennedy & Ors. [1914] AC 215
Caird v. Moss [1886] 33 Ch D 22
New India Assurance v. Lewis [1967] MLJ 156
Blackham's case [1709] 1 Salk 290
R. v. Hartington Middle Quarter (Inhabitants) [1855] 4 E & B 780
Carl Zeiss Stiftung v. Rayner & Keeler Ltd. [1967] 1 AC 853
Khan v. Golechha International Ltd. [1980] 1 WLR 1482
Hoystead v. Commissioner of Taxation [1926] AC 155
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581
Greenhalgh v. Mallard [1947] 2 All ER 255
Humphries v. Humphries [1910] 2 KB 53
A & B v. C & D [1982] 1 L1 L Rep 166
Graham v. Huddersfield Corporation [1895] 12 TLR 36

Legislation referred to:

Arbitration Act 1952, s. 6
Contracts Act 1950, s. 30
Contract Act [Ind], s. 24

For the plaintiffs - Vinayak Pradhan (Van Buerle with him); M/s. Cheong Wai Meng & Van Buerle
For the defendants - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.

JUDGMENT

Edgar Joseph Jr J:

By this originating summons the plaintiffs, who are housing developers, seek as against the defendants, who are contractors, the following reliefs:

1) a declaration that the agreement in writing entered into between the plaintiffs and the defendants for the construction of a housing development on Lot 1481 Taman Tunku Putra at Lot 1481 Kulim, Kedah is void as a contract for uncertainty;

2) a declaration and the arbitrator appointed to determine disputes which have arisen between the plaintiffs and the defendants arising out of the work allegedly done by the defendants for the plaintiffs has no jurisdiction to do so;

3) an order to restrain the said arbitrator from proceeding with the said arbitration;

4) a declaration that the order made by consent on 14 July 1986 in Penang High Court Originating Summons No. 31-482-86 be set aside and discharged;

5) alternatively, an order that the said arbitrator be directed to state in the form of a special case for the High Court, the following question of law, namely whether the agreement in writing entered into between the plaintiffs and the defendants for the construction of a housing development on Lot 1481 Taman Tunku Putra as Lot 1481 Kulim, Kedah is void as a contract for uncertainty.

The chronology of events, so far as material to the case, may be briefly stated thus:

(a) the contract referred to provided *inter alia*, that any dispute or difference arising between the parties or the architect concerning its construction or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith shall be referred to arbitration.

(b) On 26 March 1984 the defendants were given possession of the site and work commenced. But, after a certain part of the work was carried out, disputes or differences arose between the plaintiffs and the defendants as a result of which on 27 October 84 the defendants did give notice of determination of employment under Clause 26 of the contract.

(c) On 30 October 84, the defendants caused to be issued a writ of summons, being civil Suit No. 461/84 in the High Court, Alor Star, claiming RM505,700 being amounts which they alleged were due and payable to them under 5 interim certificates.

(d) The plaintiffs who, of course, were the defendants in the Alor Star proceedings, entered a conditional appearance to the writ.

(e) On 18 November 1984, the plaintiffs filed a summons in chambers to stay the Alor Star proceeding pursuant to s. 6 of the Arbitration Act 1952.

(f) On 29 November 1984, the defendants filed a summons in chambers for summary judgment under O. XIV.

(g) On 6 January 1985, Mustapha J dismissed the plaintiffs' application for stay; whereupon, on 13 January 1985. the plaintiffs lodged notice of appeal against this decision to the Supreme Court, being Civil Appeal No. 16 of 1985.

(h) Then, on 22 January 1985, Mustapha J entered summary judgment in favour of the defendants in respect of its claim for RM505,700 on the interim certificates aforesaid.

From this decision, the plaintiffs lodged another appeal to the Supreme Court, being Civil Appeal No. 32/85.

(i) But on 18 June 1985, by consent of the parties, one Mr. G.R. Moffatt, was nominated by the Pertubuhan Akitek Malaysia (PAM) to act as Artitrator in the matter of the disputes between the plaintiffs and the defendants.

(j) Consequently, Mr. Moffatt held a preliminary meeting on 7 September 1985.

(k) On 11 September 1985, the defendants filed a statement of claim with the arbitrator.

(l) But then, on 20 September 1985, the Supreme Court allowed both the plaintiffs' appeals aforesaid. One of the plaintiffs' grounds of appeal was "that the learned Judge had erred in law when he failed to appreciate that the issues in the case would be more suitable to be decided by an arbitrator well versed in the field of building construction than the Court".

(m) In allowing the appeals, the Supreme Court set aside the orders of Mustapha J of the 6 & 22 January 1985. It further ordered the defendants to refund to the plaintiffs the sum of RM525,449.18 together with interest thereon. It was then, further ordered, by consent of the parties, that the proceedings in the Alor Star High Court be stayed and the disputes between the parties be referred to arbitration. The defendants did in fact make the refund to the plaintiffs.

(n) On 11 October 1985, the plaintiffs filed their points of defence and counterclaim with the arbitrator, Mr. Moffatt, Fifteen days later, the arbitrator fixed the dates of hearing; they were to commence from 31 March 1986.

(o) On 8 November 1985, the defendants obtained an order from the Supreme Court staying execution in respect of the costs in the two appeals aforesaid.

(p) However, on 7 March 1986, the arbitrator, Mr. Moffatt, withdrew from the arbitration owing to a hearing problem. Consequently, the dates of hearing previously fixed were cancelled and new dates had to be fixed after the appointment of a new arbitrator.

(q) The defendants then took out an originating summons for the appointment of a new arbitrator named Mr. Cheang Kok Cheow. The plaintiffs consented to this on 14 July 1986 before Mr. Justice Mohamed Dzaiddin in the High Court at Penang.

(r) On 9 August 1986, the new arbitrator, Mr. Cheang Kok Cheow, ordered fresh pleadings to be delivered and, twelve days later, he fixed fresh dates of hearing to commence on 19 January 1986 until the end of the month.

(s) On 30 August 1986, the defendants filed a fresh statement of claim with the new arbitrator.

(t) On 8 September 1986, Mr. Justice Dzaiddin dismissed an application by the plaintiffs for security for costs.

(u) Then, on 4 October 1986, the plaintiffs for the first time took the point in its points of defence and counterclaim, filed with the Arbitrator, Mr. Cheang, that the contract was void for uncertainty. However, a little earlier, the plaintiffs' Solicitor did give the defendants' Solicitor notice of intention to take this point.

(v) On 11 December 1986, the defendants filed a fresh reply and defence to counterclaim, whereupon, on 7 January 1987, the plaintiffs filed the present originating summons seeking, *inter alia*, to declare the contract void for uncertainty.

I shall now turn to the plea of issue of estoppel or *res judicata* in its wider sense as it is sometimes known.

The problem which the plaintiffs face is this: they have to show that although it was open to them to have taken the point in the Alor Star High Court, in the O. XIV proceedings, that the contract, pursuant to which the architect's five interim certificates were issued, was void for uncertainty, they did nothing of the sort. Indeed, in making their own application for stay under s. 6 of the Arbitration Act 1952, in the same Court, they were relying on the very same Contract they are now seeking to impugn for uncertainty. The matter, of course, did not rest there for, on appeal to the Supreme Court, from both the orders made, upon the applications for summary judgment and for stay, the plaintiffs successfuly contended that there were triable issues with regard to the validity of the interim certificates; alternatively, their accuracy and, in the further alternative, that they had a valid claim by way of set off, arising from their contention that the works had not been satisfactorily carried out. Not only that, but the Supreme Court, had as I have said, by consent of the parties, ordered that the proceedings in the Alor Star High Court be stayed and that the disputes therein be referred to arbitrarion. (see Encl. 6 Exhibit CKS 3A). This was followed up by a consent order recorded by Mr. Justice Dzaiddin pursuant to an application by the defendants by originating summons seeking the appointment of a new arbitrator to act in the matter of the disputes between the parties under the contract.

Finally, there was the application by the plaintiffs for security for costs of the impending arbitration which application was dismissed by the same learned Judge. This was on 14 July 1986.

The dominant question of law which now arises for decision is whether, having regard to the chronology of the various legal proceedings detailed above, it is now too late for the plaintiffs to take the point by way of the present application that the contract is void for uncertainty.

Mr. Vinayak for the plaintiffs says emphatically "no". He argued that the Supreme Court decision was merely concerned with the question whether there were triable issues in the application for summary judgment. It was not, he stressed, a determination on the merits; had the defendants' claim been litigated on the merits in Court, it would have been open to the plaintiffs to raise the question of the validity of the contract. He accepted, however, that it was open to the plaintiffs, even at the stage of the proceedings in the Supreme Court, to impugn the contract as being void for uncertainty but, they did not do so, because of oversight. However, he argued there could be no estoppel against a statute: in this case. Section 30 of the Contracts Act 1950. Nor, for that matter, he said, could there be any question of estoppel applying to defeat a point of law relating to jurisdiction.

In support he referred to a wealth of authority including *A.J. Mills Co. v. J. & G. Brokers Ltd. (SB)* [1953] AIR Cal 458; *Ram Singh v. Imperial Bank of India* [1928] AIR Lah 802; *Surajmull Nargoremull v. Triton Insurance* [1924] LR 52 p. 126; [1924] 78 Ind Cas 850 1 the last six lines; *A.M. Ayyar v. P.B.L. Mudali* [1935] AIR Mad 404 and headnote to *James H. Kennedy v. David Kennedy & Ors.* [1914] AC 215, 220 - which were all cases raising a defence of illegality within the meaning of s. 24 of the Indian Contract Act and which, with respect, I do not therefore consider relevant.

He also stressed that here there was no question before the Supreme Court as to the validity of the Contract. So, there could be no question of the plaintiffs' application being barred by issue estoppel or *res judicata* in its wider sense. The case of *Caird v. Moss* [1886] 33 Ch D

22, 27 para. 2 *et seq* and p. 34 para. 3 was cited in support. He pointed out that when the Supreme Court made the Consent Order it must have intended that the issues **then** before it be referred to arbitration since, at that stage, there was already a pending arbitration proceeding following the appointment of an arbitrator with the concurrence of both parties.

The Supreme Court, he said, did not and indeed could not have conferred jurisdiction upon the arbitrator to decide the question whether the contract was void. It could only have done so with the express consent of both parties. He added, in passing, that at that stage, although the points of claim were in, no defence had, as yet, been filed. Consequently, the Supreme Court merely chose the convenient forum.

In support of his contention that the arbitrator would have no jurisdiction to decide the question whether the contract was bad for uncertainty Counsel referred to the well known case of *New India Assurance v. Lewis* [1967] MLJ 156.

There can be no doubt that if the Supreme Court had **merely** decided in Civil Appeal No. 32 of 1985 that there were triable issues disclosed by the plaintiffs and, on that score, set aside the judgment of Mustapha J and given the plaintiffs leave to defend and **nothing more,** the plaintiffs could then have, amongst other defences, pleaded in the High Court in Alor Star at the trial of the action that the claim based on the five Interim Certificates was unsustainable on the ground that the Contract pursuant to which they were issued was void for uncertainty so that the defendants would be left to frame their claim on a quantum meruit for work and labour done at the request of the plaintiffs. There would then be no question of the plaintiffs being estopped. This must be so for it is well settled law that only determinations which are necessary to the decision - which are fundamental to it and without which it cannot stand - will found an issue estoppel (per **Lord Holt** in *Blackham's* case [1709] 1 Salk 290). Similarly, in *R. v. Hartington Middle Quarter (Inhabitants)* [1855] 4 E & B 780, 794 Coleridge J stated the principle thus:

> The judgment concludes not merely as to the point decided but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue.

But, in Civil Appeal No: 16/85 against to the decision of Mustapha J refusing the application by the plaintiffs for a stay under s. 6 of the Arbitration Act 1952, the Supreme Court, in allowing the appeal, further ordered by consent that the disputes between the parties be referred to arbitration. It is noteworthy that the record provided shows that it was a specific ground of appeal that "the Learned Judge had erred in Law when he failed to appreciate that the respondent had not discharged its onus why the matter should not be referred to arbitration in view of the contract made between the appellant and the respondent".

In reliance upon this order, a number of steps were taken by both the parties to proceed to arbitration, including, as has been pointed out, a refund by the defendants to the plaintiffs of the sum of RM505,700 being the money payable under the five interim certificates, an application by the defendants seeking the appointment of a new arbitrator pursuant to which a consent order was entered in terms of the application 14 July 1986 and an application by the plaintiffs themselves for security for the costs of the arbitration which was dismissed on 8 September 1986.

I must now turn to an examination of the legal position.

The very first question which calls for determination is what were the issues decided by the Supreme Court by virtue of its order dated 20 September 1985 allowing both the plaintiffs' appeals from the two decisions of Mustapha J the first, giving summary judgment in favour

of the defendants upon the five architect's certificates issued pursuant to the contract and, the second, dismissing the plaintiffs' application for a stay of proceedings under s. 6 of the Arbitration Act. It will be recalled that as regards the first of these appeals the Supreme Court gave its decision after hearing full argument but, as regards the second, the order allowing the appeal and directing that the disputes between the parties be referred to arbitration was made by consent.

The Supreme Court did not give a written judgment; however I am permitted to look at other material in order to ascertain what it did decide. This is clear from the judgment of Lord Wilberforce in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* [1967] 1 AC 853, 964-965 where his Lordship said:

> not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence ... and if necessary other material to show what was the issue decided.

From a perusal of the available material, it is manifestly clear that both before Mustapha J and, before the Supreme Court, no issue arose as regards the validity of the contract concerned, it being assumed on both sides that it was a valid and binding contract. The defendants relied upon it as being the foundation of its claim for it was pursuant to it that the architect's certificates were issued. On the other hand, the plaintiffs also categorically relied upon the contract in the following respects: first, broadly stated, that the certificates were not certificates within the meaning of the contract; secondly, the certificates were not issued in accordance with the terms of the contract, in that the value of work improperly done was also included in the interim certificates; thirdly, that having regard to the bill of quantities under the contract there had been over-valuation and over-certification of amounts not actually due to the defendants; fourthly, the works done and the material supplied by the defendants were grossly below the requirements of the specifications of the contract; fifthly, that there had been wrongful repudiation of the contract by the defendants which entitled the plaintiffs to claim damages from the defendants; sixthly, by reason of the matters aforesaid, the plaintiffs had to demolish the defective works and material of the defendants which, under the circumstances, constituted a fundamental breach of the contract. Accordingly, the plaintiffs contended that they were not liable to the defendants for the amounts claimed and that it would seek to set off the amount of its counterclaim in diminution or in extinction of the claims made against it.

As I have said, these submissions by the plaintiffs found favour with the Supreme Court which held that there were triable issues and the order of Mustapha J refusing the plaintiffs' application for a stay under s. 6 of the Arbitration Act was, by consent, set aside and the disputes between the parties referred to arbitration.

Clearly, the consent order was made on the assumption that the arbitrator had jurisdiction to determine the disputes which had arisen.

The question for determination, as regards this part of the case, is whether the consent order thus made can operate to support a plea of issue estoppel or *res judicata* in its wider sense.

In *Khan. v. Golechha International Ltd.* [1980] 1 WLR 1482 to 1489 Brightman LJ dealt with this very question when he said at p. 1488 d: "does that admission and the consent order so made give rise to estoppel - more particularly to the brand of estoppel sometimes called issue estoppel?" dealing with the question he said this at pp. 1488 - 1489:

> First, for the general principal, *Ord v. Ord* [1923] 2 KB 432. I need not narrate the facts. I will start where Lush J said on p. 439: 'The words *res judicata* explain themselves. If the *res* - the thing actually and directly in dispute - has been already adjudicated upon, of course

> by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of *res judicata,* that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward ... 'I turn straight to the wider principle which is dealt with by Lush J at p. 443: The maxim *Nemo debet bis vexari* prevents a litigant who has had an opportunity of proving a fact in support of his cliam or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided, it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it has been.'

And then, at p. 1490, Brightman LJ added:

> The only sensible approach of the law, in my view, is to treat an issue as laid at rest, not only if it is embodied in the terms of the judgment, or implict in the judgment because it is embodied in the spoken decision, but also if it is embodied in an admission made in the face of the Court or implicit in a consent order.

It will be recalled that Mr. Vinayak explained that the point about the contract being bad for uncertainty was not taken at an earlier stage of the contest between the parties was because of oversight. I am afraid that does not help him in view of certain authorities to which I shall now refer.

In *Hoystead v. Commissioner of Taxation* [1926] AC 155 Lord Shaw delivering the judgment of the Board said this:

> In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies **not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact**. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstance. If they were permitted litigation would have no end, except when legal ingenuity is exhausted. (Emphasis added).

In *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581 the Judicial Committee of the Privy Council dismissed an appeal from the decision of the Supreme Court of Hong Kong upholding a plea of *res judicata* in the wider sense and held that it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. Lord Kilbrandon delivering the advice of the Board said this:

> The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in no. 969 came to be answered Mr. Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.

The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257, by Somervall LJ:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a proceeding to be started in respect of them.

Again, a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155, 171, "the present point was one which, if taken, went to the root of the matter on the prior occasion", appears precisely apposite to the failure, in answer to the counterclaim in no. 969, to raise the matters founded on in no. 534 which, if then substantiated, would have been then decisive."

A good example of a case which appears precisely in point where estoppel applied to prevent a defendant in subsequent proceedings from contending that a contract of tenancy was void because, upon the pleadings in former proceedings, he could have, but did not, avail himself of the opportunity is *Humphries v. Humphries* [1910] 2 KB 53.

In that case, in an action by a landlord for arrears of rent, the defendant had unsuccessfully pleaded no concluded contract. In subsequent proceedings by the same landlord claiming further arrears, the defendant was prevented from setting up the defence under the Statute of Frauds of no memorandum.

It follows, therefore, that according to the plaintiffs' own submissions, when they consented to the order made by the Supreme Court (which, incidentally, was the order they contended for) that the disputes concerned be referred to arbitration, they had made "an erroneous assumption as to the legal quality of a fact", namely, that there was a valid and binding contract under which the arbitrator had jurisdiction to act. This was fundamental to the consent order. The plaintiffs are now, in effect, seeking by the present originating summons, to resile from the position they then took in the Supreme Court because of "new views they entertain of the law or new versions as to what should be a proper apprehension by the Court of the legal result of the construction of the documents" (per Lord Shaw *in Hoystead's* Case *supra*). This they cannot do because the plea of issue estoppel or *res judicata* in its wider sense applies.

On a further ground also the defendants are entitled to succeed, for in my view they are precluded by their own conduct from denying the jurisdiction of the arbitrator.

By obtaining a stay of proceedings for the express purpose of having the defendant's claims referred to arbitration pursuant to the terms of the contract in consequence of which both parties invoked the jurisdiction of the arbitrator Mr. Morfatt by delivering their points of claim and defence, they had taken the first step in the reference. It follows that the arbitration proceedings were thus set in motion by the plaintiffs themselves; they are accordingly precluded from putting forward the contention that the contract is void for uncertainty for the avoidance of the contract involves the avoidance of the arbitration clause which is part of the contract. The plaintiffs are estopped by their own conduct from denying that the contract was valid.

The authority to which I should like to refer to in support of this part of the case is the following passage in the judgment of Mustill J (as he then was) in *A & B v. C & D* [1982] l Ll L Rep. 166, 172 Col. 2 to 173 which reads:

Finally, the plaintiffs have in my view precluded themselves by their conduct from invoking the jurisdiction of the English Court, and denying that of the arbitrators. It is true that when the arbitration was first begun the plaintiffs wrote to C purporting (in effect) to reserve their right to allege thereafter that their own notice of arbitration was invalid. I am far from convinced that a resolution of this kind would have been effective, even if it had been contained in the request for arbitration addressed to ICC. But in fact the request was unqualified. The plaintiffs invoked the jurisdiction of ICC, and by delivering their statement of case took the first step in the reference, C accepted that jurisdiction and delivered their own defence. The arbitration was thus set in motion at the instance of the plaintiffs, and they cannot now stop it without the consent of C. Nor is there any indication that ICC would themselves terminate the reference, even if the action (or some fragments of it) were to be retained in England. This being so, it would in my view be wrong to exercise the discretion under O. 11 so to create a concurrent set of proceedings. It is not in my view an answer to say that the plaintiffs were under pressure of an imminent time bar when they started the arbitration. They could, if they had wished, have taken their chance under RSC, O. 11 and elected not to arbitrate. Instead, they have gone too far along the road to arbitration now to be allowed to turn back.

There is yet another ground why this application must fail but upon which I find it unnecesary to rely and it is this: by their conduct in omitting to take the point both in the Alor Star High Court and, on appeal to the Supreme Court, that the contract was bad for uncertainty and by leaving the issues to be tried as one of fact, the plaintiffs are **deemed** to have deliberately and finally abandoned such rights as they may orginally have had to stand upon their point of law. Thus in *Graham v. Huddersfield Corporation* [1895] 12 TLR 36 CA even an omission to take the point in the Court below that the contract sued upon was not under seal and was therefore void precluded the defendants from taking it on appeal. The judgments of two of the learned Judges in that case appear relevant to the issues raised herein and merit reproduction in full:

Esher MR said that the objection that the defendants had taken their point too late must prevail. Whether they could have waived the point before they came into Court it was not necessary to determine. But they had waived the point in Court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now, and the application must be dismissed.

Lord Justice Kay said: if an action were brought against a corporation on a contract to pay a sum of money on the giving of a certificate, and if the only question at the trial was whether a certificate had been given, and the jury returned a verdict that a certificate had been given, could the corporation turn round and say that the contract was not good because it was not under seal? It was clear that they could not, for they would have waived their objection in Court, and, in his opinion, that illustrated what the defendants were trying to do in this case. They had waived the point that the promise of the committee was not binding on them during the trial, and it was too late to do so after verdict.

In all the circumstances, the originating summons was struck out as being an abuse of the process of the Court. Costs were to follow the event.

Also found at [1987] 2 CLJ 44